ABC Liquors, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 12-CA-9506 and 12-RC-5955

September 20, 1982

# DECISION, ORDER, AND DIRECTION

# By Chairman Van de Water and Members Fanning and Hunter

On April 20, 1982, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, conclusions, and recommendations of the

Respondent excepts to the Administrative Law Judge's finding that it is responsible for the acts of its director of security, Casto, contending that he was not a supervisor within the meaning of Sec. 2(11) of the Act. We find no merit in this exception. Thus, the record reveals that Casto interviewed and hired, or effectively recommended the hire of, at least one employee and that he directed at least two employees in their investigation of the unit employees' union activities as well as of suspected thefts of liquor. We note also that in its amended answer, dated August 14, 1981, Respondent admitted that Casto had been its "limited agent" since November 24, 1980. Under these circumstances, we find that Casto was a supervisor and an agent of Respondent. Additionally, we find it unnecessary to rely on the Administrative Law Judge's finding that Casto discharged employee Green.

In the absence of exceptions thereto, we do not pass on the Administrative Law Judge's failure to decide whether certain remarks made by Bailes to groups of employees in November 1980 or to employee McCollum in December 1980 constituted violations of Sec. 8(a)(1), as alleged in the complaint.

Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>4</sup>

#### **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, ABC Liquors, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

- 1. Substitute the following for paragraph 1(e):
- "(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act."
  - 2. Substitute the following for paragraph 2(a):
- "(a) Post at its warehouse and its retail store No. 3 in the Orlando, Florida, area copies of the attached notice marked 'Appendix." Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material."

challenges to the ballots of employees Ashley, Hullender, and Sursely were withdrawn at the hearing, he failed to recommend that these ballots be opened and counted. Since these ballots remain determinative of the election, we shall order that they be opened and counted and, in the event that the Union receives a majority of the valid ballots cast, that the Regional Director issue a certification of representative.

The Administrative Law Judge also recommended that the Union's objections to the election be sustained. We adopt this recommendation with respect to Objections 1, 3, 4, and 5. In light of the withdrawal and dismissals of the charges filed regarding the terminations of former employees Bowman, Green, and McCollum, however, we shall overrule Objection 2 which alleges that Respondent interfered with the election by discharging union supporters. Accordingly, we shall also direct that, in the event that the revised tally reveals that the Union did not receive a majority of the valid ballots cast, a second election be conducted.

<sup>4</sup> Respondent excepts to that portion of the Administrative Law Judge's recommended Order requiring posting of the notice at Respondent's warehouse and all of its retail stores in the Orlando, Florida, area. We find that this portion of the recommended Order is inappropriate since Respondent's unfair labor practices occurred only at its warehouse and its retail store No. 3. Accordingly, we shall require posting of the notice only at those two locations. See, e.g., Knapp Foods, Inc. d/b/a Hi-Lo Foods, 247 NLRB 1079, fn. 4 (1980).

In par. 1(e) of his recommended Order, the Administrative Law Judge used the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist language "in any like or related manner" is appropriate. We shall modify the Administrative Law Judge's recommended Order and notice accordingly.

<sup>&</sup>lt;sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. In adopting the Administrative Law Judge's credibility resolutions, we find it unnecessary to pass on his reliance on the testimonial opinion of Respondent's vice president, Bailes, regarding the conflict between his testimony and that of Timmons, a witness for the General Counsel.

<sup>&</sup>lt;sup>2</sup> The Administrative Law Judge concluded that the Charging Party's request for a remedial bargaining order should be denied on the sole ground that the Union did not possess majority status among the unit employees on the day of its bargaining demand. Member Fanning adopts this conclusion since no exceptions were filed thereto. For the reasons stated in their separate opinions in *Conair Corporation*, 261 NLRB 1189 (1982), Chairman Van de Water and Member Hunter adopt the Administrative Law Judge's conclusion.

<sup>&</sup>lt;sup>8</sup> The Administrative Law Judge noted, with respect to the challenges to the ballots of former employees Bowman, Green, and McCollum, that the 8(a)(3) charges filed subsequent to their discharges had been withdrawn or dismissed. Accordingly, we shall sustain the challenges to their ballots. Further, although the Administrative Law Judge noted that the

3. Substitute the attached notice for that of the Administrative Law Judge.

It is further ordered that in Case 12-RC-5955 the challenges to the ballots of David Bowman, James Green, and Frank McCollum be, and they hereby are, sustained.

#### DIRECTION

It is hereby directed that the Regional Director for Region 12 shall, within 10 days from the date of this Decision, open and count the ballots of Patricia Ashley, Sue Hullender, and Marilynee Sursely, the challenges to which have been withdrawn. in Case 12-RC-5955, and prepare and serve on the parties a revised tally of ballots. If the tally reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. However, if the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, a second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees with respect to their union activities.

WE WILL NOT threaten our employees with discharge if they support the Union.

WE WILL NOT threaten our employees with plant closure.

WE WILL NOT surveil our employees with the intent to discharge them because of their union activities.

WE WILL NOT hire employees so they would be eligible to vote in the union election.

WE WILL NOT instruct our employees to surveil the union activities of our other employees and to submit reports on the same.

WE WILL NOT inform our employees that other employees have been transferred to the warehouse to vote against the Union in the election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

# ABC LIQUORS, INC.

#### DECISION

### STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: The hearing in these cases was conducted before me in Orlando, Florida, on September 8, 9, 30, and October 1 and 2, 1981. The complaint and notice of hearing was issued by the Regional Director for Region 12 on February 9, 1981. It was based on a charge filed December 29, 1980, and an amended charge filed January 29, 1981.

The consolidated complaint alleges that ABC Liquors, Inc., herein called Respondent, interrogated its employees; threatened its employees with discharge if they supported the Union; threatened its employees with plant closure; surveilled an employee with the intent to discharge the employee because of his union activities; hired an employee so that the employee would be eligible to vote in the union election; instructed an employee to surveil the union activities of its employees and to submit reports on the same; and informed the employee that another employee had been transferred to the warehouse in order for the employee to vote against the Union in the election.<sup>2</sup>

Continued

<sup>&</sup>lt;sup>1</sup> Teamsters, Chauffeurs, Warehousemen and Helpers, Local 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, filed a representation petition on October 14 in Case 12-RC-5055. On December 19, 1980, an election was held in Case 12-RC-5955 resulting in 43 votes for petitioner, 44 votes cast against petitioner, and 6 challenged ballots. Three of the six challenged ballots were withdrawn by the Union at the hearing. Thereafter the Union filed objections to election on December 29, 1980. On February 13 the Regional Director issued "Supplemental Decision on Challenged Ballots and Objections to Election" and order directing hearing and consolidating cases.

<sup>&</sup>lt;sup>2</sup> As previously stated, Case 12-RC-5955 was consolidated for hearing with the instant unfair labor practice case.

With respect to the six challenged ballots, the ballots of Marilynee Sursely, Sue Hullender, and Patricia Ashley were challenged by the petitioner as casual employees. Those challenges were withdrawn at the hearing by the petitioner. The ballots of James Green, David Bowman, and Frank McCollum were challenged by both the Board agent conducting the election and the employer's observer because their names did not appear on the voter eligibility list furnished by the employer.

The General Counsel seeks as a remedy the voiding of the results of the election in Case 12-RC-5955 and an order of a new election. The General Counsel considers a Gissel bargaining order as an inappropriate remedy. To support that position the General Counsel states: (1) at no time prior to the hearing did the Charging Party request an investigation of its majority status to support a Gissel bargaining order; (2) to allow the Charging Party to pursue a Gissel remedy at the hearing would be tantamount to allowing it to amend the complaint; and (3) to allow the Charging Party to proceed on this basis would

The petitioner filed an unfair labor practice charge in Case 12-CA-9501(1-2) on December 15, 1980, alleging, inter alia, that Green and Bowman had been discharged by the employer prior to the date of the election in violation of Sec. 8(a)(3) and (1) of the Act. The petitioner later filed an unfair labor practice charge in Case 12-CA-9506 alleging that Frank McCollum had been discharged by the employer prior to the date of the election in violation of Sec. 8(a)(3) and (1) of the Act. On January 29, 1981, the petitioner withdrew Case 12-CA-9501(1-2) and amended Case 12-CA-9506 to include the allegation that Green was discharged by the employer prior to the date of the election in violation of Sec. 8(a)(3) and (1) of the Act. The portions of the aforesaid charge (Case 12-CA-9506) dealing with the discharges of McCollum and Green were dismissed by the Regional Director for Region 12 on February 9, 1981. No other evidence relating to these challenges was presented at the hearing.

On December 29, 1980, the petitioner timely filed objections to conduct affecting the results of the election. The petitioner's objections alleged the following:

- 1. The Employer engaged in surveillance of those employees who were eligible for the election so as to determine which of its employees were likely to vote in favor of the petitioner. This conduct had the effect of intimidating and coercing employees.
- The Employer discharged certain employees, who were known to be supporters of the petitioner so as to affect the outcome of the election by intimidating and coercing the remaining employees of the proposed bargaining unit.
- 3. The Employer acting through its agents and supervisors, engaged in one-on-one contact with the individual employees who were eligible to vote, coercing them and instructing them on how they were to vote in the scheduled election.
- 4. Certain employees whose job responsibilities were guards and security agents for the employer were allowed to vote in the election. Certain of the persons who voted in the election were in fact security personnel of the employer who were listed in other job classifications not disclosing their true job responsibilities and duties.
- 5. That the employer hired certain employees immediately prior to the voter eligibility date who would be able to vote in the scheduled election solely for the purpose of adding employees who would vote against the petitioner and influencing the votes of other eligible employees.

The only evidence adduced at the hearing in regard to these objections was presented by the General Counsel and Respondent. With respect to the challenged ballots of James Green, David Bowman, and Frank McCollum, as previously indicated, they were included in the petitioner's charge in Case 12-CA-9506. That portion of the charge dealing with the discharges of McCollum and Green was dismissed by the Regional Director on February 9. Although the supplemental decision of the Regional Director, referred to above, does not state the reasons for dismissal it is apparent from the record that the dismissal was based on the facts that McCollum was stealing and Green was caught with marijuana in his possession while on the job. On January 29, 1981, the petitioner withdrew Case 12-CA-9501(1-2) which included the allegation that David Bowman was discharged in violation of Sec. 8(a)(3) and (1) of the Act. That disposed of the three alleged 8(a)(3)'s, James Green, David Bowman, and Frank McCollum, and, therefore, none was included in any allegation of the instant complaint as an 8(a)(3) and (1) dischargee. In sum, of the six challenges, David Bowman was withdrawn by the petitioner on January 29, Marilynee Sursely, Sue Hullender, and Patricia Ashley were withdrawn by the petitioner at the outset of the instant hearing and the Regional Director dismissed those portions of the charge in Case 12-CA-9506 concerning the discharges of McCollum and Green. Thus, all six of the challenges have been disposed of.

allow the hearing to become a substitute for the investigative process. The General Counsel further states that by comparison of the Union's authorization cards and a stipulated list of employees, although the Region has made no determination in that regard, the Union did not possess majority status. Finally, the General Counsel argues that because the extraordinary circumstances justifying a nonmajority bargaining order as in *United Dairy Farmers Cooperative Association*, 257 NLRB 772 (1981), are not present in the instant case, the Union's request for a *Gissel* bargaining order should be denied.

The parties were afforded full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Post-hearing briefs have been received from the General Counsel, Respondent, and the Charging Party. Respondent was granted permission and did file a reply brief to the Charging Party's brief.

Upon the entire record<sup>3</sup> and based upon my observation of the witnesses and consideration of the briefs, I make the following:

#### FINDINGS OF FACT

#### I. JURISDICTION

ABC Liquors, Inc., herein Respondent, is engaged in the sale of beer, wine, and spirits at various retail stores located throughout the State of Florida and maintains its stocks at its warehouse distribution center in Orlando, Florida.

During the past 12 months, a representative period, Respondent has received gross revenues from its retail operations in excess of \$500,000 and has purchased and received goods and products at its Florida facilities valued in excess of \$50,000 from local suppliers and in turn received said goods and products directly from points located outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

# II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

### A. Facts

## 1. The organizational campaign

Beginning in the middle of September the Union started an organizational campaign among the employees of Respondent's Orlando warehouse. Employee James Green testified credibly in a consistent and straightforward manner that he initiated the organizational drive. Green said they used the vehicle of a warehouse softball team to get the young people in the warehouse together

<sup>&</sup>lt;sup>3</sup> The General Counsel's motion to correct the record dated November 9, 1981, is hereby granted and the record is so corrected.

"to initiate the idea of a union" and find out what kind of support could be mustered for a union. He said that after a few games he got most of the people together and that Al Cassella told him that he had helped along with the union drive about a year before and that he wanted to stay low-key.

Green arranged more softball games during which he talked to more people about the Union. Once he discovered that they had more than 50 percent of the people interested in a union and, at a time when he was prepared to go to the Teamsters hall, Cassella was fired. He said that when Cassella was fired "a lot of people backed out. They didn't want any part of it. They were worried about losing their jobs, a lot of the older people said. So, I just slacked off for a week and then I started talking to the guys again, trying to feel what was going on; how the general attitude was; and to see if the majority of the people still wanted it. We just lost some of the older people, some of the people that I was hoping to use as examples. People who had been there for a while. A lot of the people that the rest of the people looked up to." Green went to the union hall where he was given union pamphlets and authorization cards. He passed out the cards to his fellow employees, collecting \$10 each from the signers of the cards.4

By letter dated October 16, 1980, Respondent denied recognition and refused to review the authorization cards which the Union offered to prove majority status. The record contains 36 authenticated cards from the unit. However, as of October 8, 1980, the date of the letter demanding recognition, six of the employees who signed cards were no longer in the employ of Respondent.<sup>5</sup> Thus, the Union did not represent a majority of the employees in the unit through membership card authorizations at the time it made its demand for recognition. In mid-September, Green met with Warehouse Supervisor Joe Boslet to discuss a pending wage increase. Boslet asked Green what improvements could be made by the Company. Green told him he was concerned over job security because his friend Al Cassella had recently been fired. Boslet told Green that if the Union should win, "they could deplete the stock in the warehouse in two weeks, close the doors and get rid of everyone."

In the middle of November, Charles Bailes, Respondent's vice-president, called a meeting of the truckdrivers of the day shift and others in the warehouse and announced that there would be weekly meetings so that the drivers could present their grievances or complaints and

suggestions for improvements on the job. He indicated that Joe Boslet would be conducting those meetings. Prior to that time there were no such meetings.

Near the end of November Charles Bailes called another meeting of employees and told them that there would be a union election and that it was going to be a free secret-ballot election and added that if the Union came in the employees would be dropped to minimum wage; they would start from the ground floor, all the benefits would be taken away, that they would start from the bottom; and Respondent did not have to negotiate for a year because he would just drag it along.<sup>7</sup>

Frank McCollum, a former warehouse employee of Respondent, testified that on November 10 or 11 he had a conversation with Bailes in Bailes' office. He said that Bailes told him that it was time for his raise and that he did not want the Union to think that giving him a raise was a bribe. Bailes then told McCollum that if he found out that McCollum was a union man he was going to let him go. Bailes said that he would find out. Bailes also asked him what he thought of the Union. McCollum responded that he did not know. McCollum testified further that Bailes asked him to vote no. McCollum said that about 2 weeks before the election he had another conversation with Bailes in the breakroom of the warehouse in the presence of the night shift and mechanics, approximately 15 people, at a meeting called by Bailes. McCollum said Bailes "asked around, what did each individual-you know each person-thought about the Union. And asked them if they had ever been involved with a union."

McCollum testified further that on December 16 there was another meeting with Bailes in the warehouse where they kept broken cartons. He said this conversation involved only Bailes and himself, wherein Bailes asked him if he attended a union meeting that Sunday. McCollum replied that he had not. Bailes also asked McCollum who the union leader was, to which McCollum replied that he did not know. He asked if McCollum ever spoke to the union leaders and then asked him about Green, indicating that he, Bailes, heard that Green was "strong union." McCollum replied that he had heard that Green was a strong leader from a "couple of sources."

Later on that day McCollum saw Bailes speaking to Boslet and, still later, about 4:30 p.m. Bailes called another meeting of all the warehousemen. He brought up the subject of the union meeting that was held the previous Sunday and asked a number of the employees what they thought about the Union.

Charles Bailes denied making any threats to McCollum. I credit McCollum and not Bailes.<sup>8</sup>

<sup>&</sup>lt;sup>4</sup> The Union required that each card be accompanied by \$10 payment by the signer to demonstrate the employee's sincerity in wanting to become a member of the Union. Green withdrew \$90 from his personal bank account and turned it over to the Union to make up for the \$10 fees which certain card signers had not paid at the time they signed. On October 8, 1980, the Union addressed a letter to Respondent stating that it represented a majority of the unit employees and requesting recognition. There were 71 employees in the unit.

The record shows that the warehouse had a high incidence of turnover. Those employee names which were not on the bargaining unit personnel list of October 8, 1980, were: Marvin Evans, J. A. Cates, Tom Haines, Donald G. Harsey, Michael Lieble, and Robert Trotter.

<sup>&</sup>lt;sup>6</sup> Resp. Exhs. 10 and 11 show that James Green received a wage increase between September 13 and September 20, rather than in November as he testified. Green admitted that his memory of dates was not good.

<sup>&</sup>lt;sup>7</sup> In considering Green's testimony and that of Bailes and Boslet, wherever a conflict exists I credit Green even though his memory of dates was admittedly not the best, and not Bailes and Boslet whose testimony was not only inconsistent, but was given in a hesitant and guarded manner, selecting their words carefully as if they were rehearsed, but not well enough.

<sup>&</sup>lt;sup>8</sup> Bailes is a well-dressed smooth-talking executive type who appeared to have come up the hard way. He is in a tough business. I received the definite impression that he was capable of committing the alleged acts without giving the matter a second thought.

Frank McCollum was discharged for stealing liquor from the warehouse, having been implicated by Frank Timmons, Respondent's temporary undercover man. As previously indicated, the unfair labor practice charge alleging an 8(a)(3) violation concerning Frank McCollum was dismissed by the Regional Director. Even though the unfair labor practice charge involving McCollum was dismissed, I do not consider his discharge, standing alone, as determinative of McCollum's credibility concerning the alleged 8(a)(1) activity engaged in by Respondent through Vice President Bailes.

Frank Timmons, hired as a temporary undercover agent of Respondent, provided the evidence of theft which gave Respondent the motive for discharging McCollum.

# 2. Respondent hires temporary undercover operative Frank Timmons

On November 15, Vice President Bailes hired undercover operative Frank Timmons on a temporary basis. The term of his employment was to be 30 days. Timmons was first interviewed by Dave Casto, Respondent's security officer, on the evening of November 13 and Casto referred Timmons to Bailes. At the start of his employment Bailes told Timmons that his job responsibilities were to report to Bailes, Boslet, and Casto.

According to Bailes, Timmons came to him after his initial meeting and asked to whom he should report. Bailes told Timmons to report to Casto and, either at this meeting or a subsequent meeting, Bailes told Timmons to report to Boslet. Bailes also told Timmons that he could report directly to him, Bailes.

Timmons testified that Bailes told him he was to report on any union activities occurring in the warehouse and to acquire information regarding thefts of liquor. Bailes denied this. Bailes testified that he told Timmons, "You've got—there's a complication here. You're here to take care of some thievery; but it's complicated over there by the fact that we have a union problem, and hopefully you know, you can handle that."

Thefts of liquor had been a continual problem over the years with Respondent. However, prior to this time, Respondent had never hired a temporary undercover man, even though the Company had previously experienced liquor shortages on a continual basis. According to Timmons, Bailes told him that it was imperative for him to be in working that day (November 15) because eligibility for voting was cut off as of November 15. On cross-examination, Bailes said he did not recall making this statement. But, on redirect examination, Bailes flatly denied telling Timmons that he was hired that day in order for him to be eligible to vote in the election.

Timmons received the following undated memorandum from security officer Dave Casto which provides in pertinent part:

Your assignment is one of an undercover operative. You must work in the utmost secrecy; conse-

quently your points of contact must be discreet, out of sight and hearing of co-workers, and must be limited to me or in my absence to Mr. Bailes, Mr. Vannoy, or if absolutely necessary you may go to Mr. Holloway directly.

Your primary duty is to gain the confidence, and establish a rapport with all employees in the warehouse, and through discussion and observation determine the identity and plan of action of those individuals who may be spreading dissention [sic] andor advocating any union activity. Additionally, attempt to determine the general attitudes of all employees related to union activity. You must take no action which might indicate that you are anyone other than a normal warehouse employee. Since you have experience in investigative techniques, I need not remind you of the importance of total secrecy. Under no circumstances must you reveal that you had conversations with anyone in upper management, or that they have any knowledge of your present position or activities.

Your secondary duty is to determine any problems or modus operandi related to pilferage or diversions of property within or leaving the warehouse. Monitor the following:

. . . . .

I will discuss other concerns as I gain more insight into matters of concern. Please contact me after each duty day to discuss your status. I may be reached at 293-3779. Follow any other guidance or instructions received from those in your chain of command.

Good Luck, Dave Casto

Besides performing the normal duties of a warehouseman, Timmons was to engage in undercover activities. He was paid \$4 per hour, the normal compensation for a warehouseman, and he received an additional \$1.50 per hour as compensation for his undercover work.<sup>10</sup>

After Timmons' discussion with Bailes, Bailes lead Timmons to Boslet's office and introduced him to Boslet. Boslet then iterated that Timmons was to report on thievery and union activities in the warehouse. Boslet referred specifically to one of the employees he felt was the main union organizer, James Green, and told Timmons that "it would be good if I could get something on him, that would justify firing him." Timmons reported nightly by telephone and weekly by written reports to Casto. These reports contained information relating to both the union activities and to thievery. 12

<sup>&</sup>lt;sup>9</sup> For reasons, which will be discussed further, based on the entire record in this case, I conclude that Respondent's actions demonstrate the extent that it would go, including lying under oath, to deny its employees their legal rights and destroy their organizational efforts.

<sup>10</sup> The check for the undercover work was sent to him by mail to his residence to avoid detection by his fellow employees.

<sup>11</sup> Boslet testified that he was called to Bailes' office.

<sup>12</sup> Respondent stipulated that Timmons did report on union activities and conversations concerning the union support among Respondent's employees to Bailes, Casto, and Boslet. However, Respondent did not stipulate that these reports were in response to instructions for Timmons to make them. On December 7, Timmons and another employee, who was

Shortly after James Green was fired on December 11 or 12,<sup>13</sup> Bailes met with Timmons, and complimented him on doing a good job in finding a way for the Company to justify discharging Green. (Bailes testified that he "may have complimented him on his work with Mr. Green.") On this occasion and 1 week later, Bailes also asked Timmons to identify the union supporters and to give Bailes a reading on employee sentiments. Bailes denies this. Again, I credit Timmons.

A few days before the election Bailes again asked Timmons for names of those who were supporting the Union and how Timmons felt the election would go. Bailes also denies this. Timmons told Bailes that he thought the vote would be close, after which Bailes told Timmons that, even though he had worked beyond the 30 days for which he was hired, he wanted Timmons to stay to vote in the election. When Timmons returned to get his paycheck a few days before Christmas, Bailes told him that his lawyers would probably contact him about some union charges and that there were ways to circumvent the truth. Bailes testified, "I told him that we never wanted him to tell a lie about anything that he had ever done, and that sometimes the way people express things can leave an impression that is false."

Casto told Timmons on December 7 that he would be interrogating employees believed to be union supporters that following week. On December 9, Casto told Timmons that he was following Green because he needed to get "something on him to fire him." Later that day, Casto fired James Green. David Bowman, a warehouseman employee, was interrogated by Casto on December 11. Casto asked Bowman if he had given Jim Green \$10 for the Union. Green had previously collected \$10 from each employee who signed a union card. In agreement with the General Counsel, I find that, by asking Bowman if he had given Green money, Casto was, in effect, asking Bowman if he had signed an authorization card. Besides this interrogation about his union activities. Casto tape-recorded the conversation. 15 During that conversation Casto accused Bowman of stealing liquor which Bowman denied. Casto then threatened Bowman that if he did not sign a statement to that effect that Bowman would go to prison, informing Bowman that he (Casto) is a former employee of the FBI, CIA, and Los Angeles police department. 16

In addition to the Orlando warehouse, Respondent operated 153 retail liquor stores in central Florida (70 with lounges or bars). Respondent's employee at store 3, Robert Kortus, upon noticing that the only janitor employed there had been absent asked the store manager, Phillip Smith, the whereabouts of the janitor. That conversation took place on December 10. Smith told Kortus that the janitor, Terry Tinkerton, had been sent to the warehouse. On December 14, Kortus again asked Smith about Tinkerton. Smith told Kortus, "don't say anything to anybody, but . . . Terry was sent down to the warehouse to vote 'NO' against the Union." 17

Kortus persisted in his inquiries by asking Assistant Store Manager Steve Panzner if Panzner knew about Tickerton's transfer. Panzner too told Kortus that Tinkerton had been sent to the warehouse to vote against the Union.

#### 3. Further discussion and conclusions

On December 16, 3 days before the election, Bailes asked Frank McCollum to meet with him. At the meeting Bailes asked McCollum if he attended the union meeting that previous Sunday to which McCollum responded in the negative. McCollum testified that Bailes also asked him what the Union wanted and who was the union leader. McCollum told him he did not know. Bailes then asked if McCollum spoke to union leaders. Again McCollum said "no." McCollum then was asked whether he had heard that Green was "strong union." McCollum replied that he heard Green mentioned as a strong union man a couple of times.

McCollum testified further that at or about 4:30 p.m. that day Bailes called a meeting of all the warehousemen present in the warehouse at the time. He said that the first thing that Bailes brought up was the union meeting held the previous Sunday. He then told the employees about James Green's termination. He then inquired of a few what they thought about the Union.

Bailes testified that at every meeting he "encouraged employees to attend every union function that they could." However, Bailes denied that he asked McCollum what the Union wanted and who the union leader was. He denied telling McCollum that he had heard that James Green was a strong union leader. 18 Bailes admitted that he may have asked the employees if they had gone to a union meeting the prior Sunday and that he especially encouraged the employees to attend the union meeting at Moss Park. Bailes denied, however, interrogating the employees about their attendance at this meeting. Bailes admitted discussing James Green's termination with the employees but denied asking a few of the employees what they thought about the Union.

This case turns largely on the credibility of the various witnesses. As previously stated, I have discredited the

also hired to report on union activities and thievery, met at Casto's home. Timmons and the other employee checked off the names of employees they believed would vote for the Union. Casto told Timmons that Bailes had become paranoid and that they had to forget the thievery part of the assignment and that they had to reduce the number of people in the warehouse because the election was very close and they had to get something on these people to get them out. In addition, Casto told Timmons that Respondent had a feverish dislike for Jim Green and they wanted to eliminate him.

<sup>13</sup> Green, along with McCollum, had filed unfair labor practice charges concerning their discharges alleging 8(a)(3) violations. As previously indicated, the Regional Director dismissed these charges against Respondent concerning McCollum and Green. As indicated above, McCollum was fired for stealing. Green, according to Respondent, was fired for possession of a controlled substance (marijuana).

<sup>14</sup> Timmons quit working for Respondent the day of the election because he believed his life was in jeopardy and that his undercover assignment might be exposed.

<sup>18</sup> Casto, although still in the employ of Respondent, did not testify.

<sup>&</sup>lt;sup>16</sup> Bowman's 8(a)(3) charge, as previously stated, was withdrawn by the Union.

<sup>17</sup> Smith denied that he had any such conversation with Kortus. I credit Kortus. Smith was evasive and hesitant.

<sup>18</sup> I credit McCollum with respect to this conflicting testimony.

testimony of Vice President Charles E. Bailes, Jr., and that of Joseph Boslet, general warehouse supervisor for Respondent, among others.

An example of Bailes' testimony, taken from the transcript of the proceedings, follows. On cross-examination by the General Counsel Bailes testified as follows:

- Q. Isn't it true that you told Mr. Timmons that you wanted him to begin working that day so that he would be eligible to vote in the NLRB election?
  - A. I don't recall telling him that.
  - Q. You don't recall, or you deny it?
  - A. I don't recall.
  - Q. Okay.
  - A. If I did recall, I'd tell you.

. . . . .

- Q. Did you at any time tell Mr. Timmons that you wanted him to inform you of union activities?
- A. I'll say no, and I'll qualify that. I don't remember ever ordering, suggesting or any way demanding that he report to me on union activities.
- Q. Did you instruct Mr. Timmons to report to Mr. Casto or Mr. Boslet, concerning union activities?
  - A. I sure did.
  - Q. On union activities?
  - A. Yes.
- Q. To whom? To whom did you want him to report on union activities?
  - A. Mr. Casto.
  - Q. When did you tell Mr. Timmons this?
- A. Oh, sometime about—when did I tell who this?
  - Q. Mr. Timmons.
  - A. I never told Mr. Timmons this.
- Q. My question was: Did you at any time tell Mr. Timmons to report to Mr. Casto or Mr. Boslet?
  - A. On union activities, no, I never told him that.
  - Q. Who did you tell?
  - A. I'm confused.
  - Q. You must have told someone that.
- A. Could we have your first—your question—I think either you got mixed up or I did.
- Q. You're right; one of us is confused. Did you ask anyone to report on union activities?
  - A. Yes
  - Q. Who did you ask to report on union activities?
  - A. Mr. Casto.
  - Q. To whom was Mr. Casto to report?
  - A. Me.
- Q. And Mr. Timmons was to report to Mr. Casto?
  - A. Right.
- Q. Okay. So isn't it safe to assume that Mr. Timmons was also to report on union activities?

. . . . .

Q. Wouldn't it be safe to assume, then, that Mr. Timmons, since he was to report to Mr. Casto, would also be reporting on union activities?

#### A. Yes.

With respect to the diametrically opposite testimony between Bailes and Timmons, Bailes, after acknowledging that there was conflicting testimony between him and Timmons, testified as follows:

I'll say that I have even more respect for Mr. Timmons' intelligence now than I did when he was working for me. To me, he is an excellent witness. He has dodged, in my opinion, around the truth and has left impressions, either by not replying—he has left impressions that in my opinion are false and, when someone leaves that impression whether outright lie or not, when he leaves that impression, he has in fact—and led someone to believe that and left that impression—he has not told the truth. 19

On direct examination Boslet testified that Timmons told him some warehousemen were getting together in a park and, "I said, 'well, is there any booze involved?' And, he said, 'well, again, I'm not sure at this time, but I will get more information on it, and I will report to you.' And again that's as far as it went."

As for General Warehouse Supervisor Boslet's testimony, which conflicted with Green's and Timmons', I find it also to be incredible. In that regard, Boslet testified, concerning a conversation between Timmons and himself about a union meeting in Moss Park, as follows:

- Q. Mr. Boslet, during your initial meeting with Timmons, can you state whether or not the subject of the union even came up at all?
- A. I think that I made a statement that, "we have union problems." I feel pretty sure that I did, because I said, "in your investigation here with thievery, I know you're gonna hear a lot of talk about unionism and about the organization." I'm quite sure I mentioned it.
- Q. What, if anything, did Mr. Timmons say to you at that time?
- A. Again, he told me—says, "I understand that some warehouse employees and some drivers are having a meeting at a park, concerning I'm sure he said—concerning union activities. And, my first—I think my first response was, 'Well who's furnishing the booze?'"

On cross-examination Boslet testified as follows:

- Q. Mr. Boslet, what did Mr. Timmons tell you with regard to any union activities, in connection with this meeting at the park?
  - A. He didn't tell me anything.

Boslet said that later during the conversation Timmons told him they were having a meeting in the park and they were going to talk about the Union.

<sup>19</sup> The words "To me, he is an excellent witness," in referring to Timmons because, according to Bailes, he lied under oath reveals more about Bailes than Timmons.

In my judgment, the General Counsel has proven by a preponderance of credible evidence that Frank Timmons was an agent of Respondent within the meaning of Section 2(13) of the Act; that he was hired as an investigator and instructed to report to the vice president, the general warehouse supervisor, and the warehouse security director about union activities and thefts. Respondent admitted that Timmons did in fact report to Bailes, Boslet, and Casto on union activity and thievery. I find that the reports were submitted pursuant to instructions from management. Respondent's failure to call Warehouse Security Director Casto to testify leaves Timmons' testimony with respect to his conversation with Casto uncontroverted. AM General Corporation, 224 NLRB 845 (1976); Florida Steel Corporation, 214 NLRB 264 (1974); Farah Manufacturing Company, Inc., 214 NLRB 304

I find that Boslet threatened to close the warehouse if the Union should win the election. According to Green, Boslet told him that Respondent could go to, "direct deliveries," meaning deliveries directly from wholesale distributors to Respondent's retail stores instead of routing to deliveries through the warehouse and then to the retail stores.

The unrebutted testimony of David Bowman concerning his conversation with Dave Casto proves interrogation by Respondent's agent. Casto asked Bowman if he had given James Green \$10 which in effect was asking Bowman if he had signed a union authorization card. I find that to be a violation of Section 8(a)(1) of the Act.

I find that the remarks to Robert Kortus by Smith and Assistant Manager Panzner concerning the transfer of Terry Tinkerton from store 3 to the warehouse for the purpose of voting against the Union in the upcoming election to be independent violations of Section 8(a)(1) of the Act.<sup>20</sup>

In sum, I find that Respondent interrogated its employees; threatened them with discharge if they supported the Union; threatened them with plant closure; surveilled an employee with the intent to discharge him because of his union activity; hired an employee so that he would be eligible to vote in the union election; instructed an employee to surveil the union activities of its other employees and to submit reports on the same; and informed an employee that another employee had transferred to the warehouse to vote against the Union in the election, each such conduct is in violation of Section 8(a)(1) of the Act.

# IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. They are unfair labor practices

within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

#### CONCLUSIONS OF LAW

- 1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The following unit is an appropriate unit within the meaning of the Act:

All truck drivers, shipping and receiving employees, storage employees, mechanics and warehouse inventory employees, employed by the Employer at its warehouse located in Orlando, Florida; but excluding office clerical employees, casual employees, guards ard supervisors as defined in the Act.

- 4. Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and committed unfair labor practices within the meaning of Section 8(a)(1) of the Act by:
- (a) Interrogating employees about their union activities.
- (b) Threatening its employees with discharge if they supported the Union.
  - (c) Threatening its employees with plant closure.
- (d) Surveilling an employee with the intent to discharge the employee because of his union activities.
- (e) Hiring an employee so that he would be eligible to vote in the union election.
- (f) Instructing an employee to surveil the union activities of its employees and to submit reports on the same.
- (g) Informing an employee that another employee had been transferred to the warehouse to vote against the Union in the election.
- 5. Such unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

# REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that it cease and desist therefrom and take affirmative action to effectuate the policies of the Act, including the posting of appropriate notices.

The Charging Party takes the position that a bargaining order should issue in this case. Respondent and the General Counsel oppose the issuance of a bargaining order as being inappropriate. At the time of the demand for recognition the Union did not represent the majority of the employees of the Employer. For that reason alone, I do not recommend a bargaining order in this case.

The General Counsel has proven by a preponderance of the credible evidence that Respondent has engaged in all of the unfair labor practices alleged in the complaint. Moreover, I find merit to the objections to the election. Accordingly, I shall recommend that the election held on December 19, 1980, in Case 12-RC-5955 be set aside, that said case be remanded to the Regional Director for Region 12 to conduct a new election when he deems

<sup>&</sup>lt;sup>30</sup> Panzner, assistant store manager, did not testify. Therefore, Kortus' testimony concerning Panzner's statement stands unrebutted.

that the circumstances permit the free choice of a bargaining representative.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>21</sup>

The Respondent, ABC Liquors, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Interrogating its employees.
- (b) Threatening them with discharge if they support the Union.
  - (c) Threatening its employees with plant closure.
- (d) Surveilling employees with the intent to discharge employees because of their union activities; hiring employees so that they would be eligible to vote in the union election; instructing employees to surveil the union activities of other employees and to submit reports on the same; and informing employees that other employees had been transferred to the warehouse to vote against the Union in the election.
- (e) In any other manner interfering with, restraining, or coercing employees in the exercise of the right of self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Local 385, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other activities for the purpose of collective bargaining or other mutual aid or protection as

guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the intent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act as modified by the Labor Management and Disclosure Act of 1959.

- 2. Take the following affirmative action which it is found will effectuate the policies of the Act:
- (a) Post at its warehouse and retail stores in the Orlando, Florida, area copies of the attached notice marked "Appendix."<sup>22</sup> Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (b) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that a second election by secret ballot shall be conducted among the employees in the unit found appropriate herein, at such time as the Regional Director for Region 12 deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the notice of second election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

<sup>&</sup>lt;sup>21</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>22</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."